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No. 02 __

IN THE

Supreme Court of the United States

JANE S. WEAVER, *Pro se*,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do procedures for reviewing Individual Right of Action cases under the Whistleblower Protection Act, 5 U.S.C. § 1221, violate due process?

2. Does public policy forbid enforcing without a hearing a contract of silence obtained as a condition of a whistleblower's transfer?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jane S. Weaver respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit, which affirmed the order of the Merit Systems Protection Board (MSPB) denying that it had jurisdiction over the claims she raised before it.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished, though available electronically at 34 Fed.Appx. 788. It is reproduced in the Appendix at pages 1a-3a. A copy of the order denying petitioner's motion for rehearing or rehearing en banc is at page 4a. The MSPB denied the petition for review in an unreported order reprinted at pages 5a-7a. The Initial Decision of the Administrative Judge (AJ) thereby adopted is

reproduced at pages 8a-28a. The letter from the Office of Special Counsel (OSC) concerning the termination of its investigation is reprinted at page 29a.

JURISDICTION

The Federal Circuit entered its decision in this case on May 14, 2002, and issued an order denying a timely suggestion for rehearing or rehearing en banc on August 8, 2002. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Article III, Section 1 of the United States Constitution provides, in pertinent part:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The First Amendment, in pertinent part, provides, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The pertinent parts of the Fifth Amendment state that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law." Weaver sought relief from the MSPB pursuant to 5 U.S.C. § 1221. That and other pertinent sections of the Whistleblower's Protection Act (WPA) are set forth in Appendix attached hereto, as are relevant MSPB regulations and portions of Rule 6(e) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE[1]

Petitioner Jane S. Weaver was a career attorney employee in the Fraud Section, Criminal Division of the Department Justice (DOJ). Beginning shortly before a meeting of the Attorney General's Advisory Committee in July 1996, Weaver made disclosures up DOJ's chain of command concerning, *inter alia*, misleading statements concerning matters in a recent GAO report and grand jury violations. Supervisors issued retaliatory documentation, removed cases, and assigned Weaver paralegal duties. When Weaver filed an internal appeal, one supervisor delayed the Section's response until immediately after another questioned Weaver about her appeal, then ordered Section employees to perform a warrantless search of Weaver's office, seized government and personal property therein, and also restricted Weaver's access within the office. The Section filed its overdue reply the next day. More non-appealable documentation issued after the Criminal Division denied another component's request for Weaver's services. Weaver received no name-clearing hearing, nor notification of any right to appeal outside DOJ. As a condition for any transfer, officials demanded Weaver's resignation and conversion to a temporary appointment. On June 3, 1997, the day after another office lockout and as a result of a personnel officer's misrepresentations, Weaver signed the proffered agreement. DOJ then failed to fulfill its placement promises, despite requests, and instead terminated Weaver on March 3, 1998.

Weaver first wrote OSC about her internal whistleblowing at DOJ, and the subsequent retaliation, on March 12, 1999. On September 1, 1999, after additional disclosures during the intervening months to the Deputy Attorney General and officials in the U.S. Attorney's Office for the Southern District of Florida, Weaver again notified OSC, this time on

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[1] Based upon documents in the Joint Appendix to the Federal Circuit.

its new form. Her complaint was assigned to the Complaints Examining Unit. On January 11, 2002,Weaver responded to OSC's request for additional documentation. She also requested an OSC subpoena for additional items that possibly implicated grand jury secrecy,[2] but OSC never issued one. Weaver wrote the Special Counsel about DOJ supervisors' suggestion that she become a named plaintiff in the overtime class action lawsuit which mentioned widespread retaliation fears within DOJ. She urged OSC to intervene. Instead, on March 10, 2000, OSC terminated its investigation, and notified her by letter of a right to seek corrective action from the MSPB.

Weaver timely filed with the MSPB, and also filed a RICO/Bivens action under seal in U.S. District Court. Weaver's MSPB package included a motion to seal so that she could discuss her work, an expurgated and condensed report of the retaliation she experienced, and OSC's right-to-sue letter. The assigned Administrative Judge (AJ) repeatedly demanded OSC's closure letter as well. Weaver submitted only the redacted paper materials provided to OSC and cited her statutory right not to submit other documents from OSC. She also proffered that she could not submit the additional electronic material previously given to OSC absent the requested protective order, particularly since the parallel District Court case remained under seal. Meanwhile, DOJ refused Weaver's discovery requests, and the AJ and MSPB refused to allow her to review other files to learn its unpublished rules for whistleblower cases.

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[2] Weaver identified DOJ's stance in *In re Sealed Case No. 99-3091*, 192 F.3d 995 (D.C. Cir. Sept. 7, 1999) to the OSC and AJ as the basis for her subpoena request. Since her internal disclosures, the D.C. Circuit also addressed F.R.Cr.P. 6(e) in *In re Sealed Case*, 121 F.3d 729 (D.C.Cir. June 17, 1997)("presidential communications privilege"), *In re Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. May 5, 1998), *cert. denied* 525 U.S. 820 (1998)(narrow secrecy constr.) and *In re Sealed Case*, 250 F.3d 764 (D.C. Cir. May 11, 2001)(ditto).

The AJ then dismissed Weaver's case for lack of jurisdiction, without any hearing. The Initial Decision interpreted provisions of the agreement Weaver signed as a condition of her transfer as proving voluntariness and removing MSPB jurisdiction over her constructive discharge claim. The AJ also held that Weaver failed to provide evidence establishing jurisdiction under the WPA's IRA provisions, citing her refusal to submit the closure letter and failure to specify sufficiently her protected disclosures. The AJ then dismissed Weaver's requests for a protective order and discovery as moot.

Weaver filed a timely petition for review with the MSPB, which denied it. She appealed to the Federal Circuit, which chose not to hear oral argument. The *per curiam* opinion affirmed the MSPB's lack of jurisdiction because Weaver failed to repeat her DOJ disclosures to OSC and thus failed to exhaust administrative remedies. It also held Weaver improperly relied upon OSC's termination letter to establish jurisdiction under the WPA. The decision further determined that Weaver was not entitled to a hearing on her constructive discharge claim because she had not established that the settlement agreement was involuntary. The opinion failed to mention the AJ's refusals to seal and compel discovery, nor the OSC's refusal to issue the requested subpoena. It concluded simply, by labeling Weaver's remaining constitutional, individual right of action and constructive discharge arguments "unpersuasive." Weaver requested a rehearing or rehearing en banc, but was denied.

REASONS FOR GRANTING THE PETITION

This case offers a unique opportunity to resolve important due process and separation of powers issues inherent in implementation of the Whistleblower's Protection Act of 1989. This Court has never interpreted the statute, despite its applicability to most federal employees. Most *pro se*

petitioners have been unable to formulate the compulsion in the procedures below, address the statute and public policy concerns, or afford litigation.

Exercise of the Court's discretion is also warranted by a circuit split concerning attorney confidentiality and government ethics issues. Indeed, at this very moment, an overtime pay class action lawsuit involving many anonymous DOJ attorney plaintiffs who allege retaliation fears (but not whistleblowing) remains before the U.S. Court of Claims.[3] Their numbers and nationwide practice indicate the importance of disclosure, ethics and retaliation issues, particularly among attorney employees. Exercise of the Court's supervisory power may even be warranted because the integrity of judicial proceedings may be compromised if this executive agency can restrict its attorney employees from judicial fora after reporting misconduct internally.

I. PROCEDURAL DUE PROCESS VIOLATIONS

The Federal Circuit never addressed petitioner's due process arguments. The *per curiam* opinion found that Weaver had not exhausted administrative procedures because she had not repeated her internal DOJ disclosures to the OSC, and stated that her reliance upon the OSC's termination letter to establish MSPB jurisdiction was "without merit." It ignored the subpoena/protective order issues, dismissing her arguments under the Constitution and statutory Individual Right of Action as "unpersuasive."

In fact, the OSC's and MSPB's procedures violate due process because they ignore the statute, as well as this Court's jurisprudence. Both executive agencies utilize performance bonuses, which violate the due process right to an impartial

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[3] *Doe* v. *U.S.*, 44 Fed.Appx. 499 (Fed.Cir. No. 02-5045, unpublished, issued August 7, 2002). Claims Court No. 98-896C selected filings viewable at *www.dojclass.com.*

adjudicator by encouraging quick dismissals. Furthermore, both OSC and MSPB improperly penalized petitioner by dismissing her administrative case after denying her requests for a subpoena and protective order, respectively, which she needed in order to repeat her internal disclosures at DOJ without risking criminal contempt of district courts. Finally, the MSPB has converted statutory *de novo* adjudications into appellate review, thus ignoring the normal judicial practice of evaluating dispositive motions by construing all evidence and drawing all inferences in the light most favorable to the non-moving party. These procedures differ from analogous statutes which this Court has upheld, and thus warrant review.

A. Background—Administrative Procedures

In 1978, Congress comprehensively revised the civil service laws and created the MSPB to handle the adjudicative functions of the former Civil Service Commission. The Office of Special Counsel, within the MSPB, was to protect government employee whistleblowers. A decade later, upon finding few whistleblowers actually protected and widespread fear of retaliation among federal employees (many of whom thus failed to report wrongdoing), Congress passed the Whistleblower Protection Act of 1989. *Inter alia*, the WPA made OSC independent of the MSPB, established a simpler and fairer standard for whistleblowers to prove retaliation by their agencies, and allowed federal employees whose complaints the OSC terminated an Individual Right of Action before the MSPB. Congress also required both OSC and MSPB to seek reauthorization periodically. During the next reauthorization, Congress learned of continued retaliation and narrow interpretations by the Federal Circuit, MSPB and OSC, and so further liberalized the WPA in 1994. Changes

included adding a catch-all prohibited personnel practice and conforming discovery to the Federal Rules of Civil Procedure.[4]

The WPA's administrative investigation schema echoes procedures under the civil rights and labor laws, and involves both bonus-eligible AJs and independence-protected ALJs. The OSC, an investigative and prosecutive agency, receives complaints from current and former government employees and applicants who believe they were retaliated against for speech protected by the WPA. OSC accepts some matters for further investigation, and in others declines to investigate. Whenever the OSC decides not to investigate or to stop investigating, it issues a right-to-sue letter similar to those issued by the EEOC in civil rights cases. OSC also issues another letter which is supposed to discuss the evidence considered and explain its rationale for not acting.

OSC prosecutes prohibited personnel actions before an ALJ assigned by the MSPB.[5] Individuals receiving a no-action letter from the OSC can file a IRA form with the MSPB. The MSPB then assigns an AJ, who issues a form order requiring the employee to prove jurisdiction and the agency to submit its file. Discovery and a hearing may be requested; the AJ ultimately issues an Initial Decision. This resembles the review individuals can receive within the EEOC.[6] Adverse decisions in civil rights matters by both

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[4] Weaver posted relevant sections of the WPA's legislative history cited below, linked at www.peregrinos.us/leghistlink2.htm. This year, Congress addressed retaliation through an alternate route, passing the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002, that President Bush signed on May 15, 2002.

[5] The MSPB's sole remaining ALJ retired in 2001. A press release available at *www.mspb.gov* announced that the MSPB would borrow ALJs from the NLRB or other agencies as necessary.

[6] *See* K. Moss, S. Burris, M. Ullman, M. Johnsen, J. Swanson, *Unfunded Mandate: An Empiral Study of the Implementation of the*

EEOC AJs and MSPB AJs can be appealed to district court where, pursuant to *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the employee receives a *de novo* hearing. District judges also hear civil rights cases prosecuted by the DOJ and EEOC. The losing party in any other matter before an MSPB AJ (including all whistleblowers), has no right to a *de novo* hearing in district court. Such individuals can petition the MSPB for review of the Initial Decision, or appeal directly to the Federal Circuit.

This procedure resembles that under labor and environmental whistleblower statutes, with two important exceptions: (1) the Administrative Procedure Act's protections do not apply to adjudications under the federal personnel laws and (2) the MSPB's AJs are not ALJs. In environmental enforcement cases, for example, employees can appeal OSHA's investigatory terminations to an ALJ at the Department of Labor, and the losing party can appeal to the Appeals Review Board (ARB), whose decisions can be reviewed by the regional Courts of Appeal. The National Labor Relations Board also uses ALJs instead of AJs at the initial decision level, with review available first from the NLRB and then the regional Courts of Appeal.

B. Performance Bonuses Compromise Due Process

In their creative wisdom, the founding fathers included in Article III, Section 1, a requirement that judges' compensation not be reduced during their tenure. Protecting judicial pocketbooks guards judicial independence and integrity. In *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927), Chief Justice Taft recognized that due process required the absence

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Americans with Disabilities Act by the Equal Employment Opportunity Commission, 50 Kansas L.Rev. 1 (2001).

of procedures that might possibly tempt judges to shift the burden of proof or "otherwise lead him not to hold the balance nice, clear and true between the State and the accused."

The MSPB, as an executive agency, chooses to award cash performance bonuses to its AJs each January, based upon factors including the number and speed of their adjudications.[7] AJs are eligible for performance bonuses pursuant to 5 U.S.C. § 4302(b)(4), while full-fledged administrative law judges (ALJs) fall outside the definition of employee in 5 U.S.C. § 4301(2)(D). Because hearings and discovery take time, the performance pay system provides an incentive for AJs to hold fewer hearings, allow less discovery, and instead rely on documentary submissions.[8]

Clearly, the Ohio scheme rejected in *Tumey* was performance-based. That is precisely how it affected judicial impartiality and violated the Constitution's due process requirement. The MSPB's compensation scheme has the same effect—improperly tipping the balance toward the government and against employees alleging reprisal for protected whistleblowing. The logic should be compelling, even if statistical proof for this equal protection/ procedural due process argument is limited by the MSPB's secrecy about its docket and files, quite unlike common law practice and

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[7] H.R. Serial No. 103-19, 103rd Cong., 1st Sess. 47-48, 61 (1993).

[8] The MSPB conceded to the GAO that it found prohibited personnel practices in only 2 of 440 WPA cases in 2000. The Federal Workforce: Observations on Protection from Reprisals for Whistleblowing, GAO 01-715t (May 9, 2001) at p. 6. Tables in Weaver's Federal Circuit brief demonstrated the high dismissal rate for IRAs, and the handful of reversals at the PFR level. Because the MSPB refused Weaver access to other files, she could not determine whether the MSPB denied her PFR as a result of the unpublished requirements hinted at in H.Serial No. 103-19, pp. 32, 43-44.

modern judicial standards.[9] This use of adjudicative titles while rejecting procedural safeguards warrants the Court's attention.

C. Confidentiality Conflicts Among Circuits

The Federal Circuit opinion, in affirming the MSPB's lack of jurisdiction over Weaver's WPA claim, failed to mention the OSC's refusal to issue a subpoena, and the AJ's refusal to issue the requested protective order which would have enabled Weaver to at least submit all the materials proffered to OSC. The Federal Circuit and MSPB thus accorded agency confidentiality concerns undue deference, without balancing petitioner's right to due process, especially as it incorporates her First Amendment right to judicial access, Fourth Amendment right to be free of unreasonable searches and seizures, and Fifth Amendment right against self-incrimination.

Nothing in the WPA statute requires verbatim repetition of the protected whistleblowing disclosures to establish jurisdiction, yet both agencies determined Weaver's extensive but sanitized disclosures insufficient.[10] Both administrative

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[9] The MSPB accords its hearing officers judicial titles, but not the public accountability normally demanded of judges. Outside the very limited docket initiation discovery allowed Weaver, the MSPB has concealed the identity of every AJ whose Initial Decision it has reviewed in a published decision, and also decided not to reveal their employment histories. By contrast, the Federal Judicial Center compiles curriculum vitae of Article I and III judges, published reporters reference the judge below, and the public can inspect judicial records at courthouses absent case-specific protective orders. Finally, unlike the financial disclosure forms of Article I and Article III judges made publicly available through the Office of Government Ethics, those filed by AJs remain secret.

[10] OSC's nonissuance of the subpoena Weaver requested does not indicate that she failed to exhaust administrative remedies, but rather that she *did* exhaust them. Weaver had already provided OSC with significant documentation, including a ten-page, single-spaced timeline and disk of electronic files. She proffered that she had additional documents, but

agencies requested additional information, while also withholding the necessary and reasonable measures Weaver requested to protect herself against self-incrimination, given the confidential criminal investigations inherent both in her job and their requests.

The sanitized materials which Weaver proffered all referred to grand jury secrecy. F.R.Crim.P. 6(e)(3)(C) requires district court authorization for any disclosure outside DOJ, as the MSPB or OSC certainly were. DOJ rejected her request to obtain such order while at the same time advocating jurisdictional dismissal at the MSPB.[11] Thus, Weaver could not repeat verbatim her internal disclosures at DOJ (concerning improper access outside DOJ) without violating prosecutorial ethics and risking criminal prosecution. In fact, DOJ had initiated criminal prosecution and the OSC and MSPB both dismissed the case of a non-lawyer who naively produced 6(e) material in *O'Brien* v. *Office of Independent Counsel*, 79 M.S.P.R. 406, 414 (1998). That the Chief U.S. District Judge for the District of Columbia issued a protective order in the parallel case underscored the need for one before the MSPB, and confirmed Weaver's fear of prosecution should she comply with the OSC examiner's request or the AJ's order.

Demands that petitioner repeat in full her oral and written disclosures without the requested subpoena (by the OSC), and sealing order (by the MSPB), respectively, violated the Fifth Amendment's self-incrimination protection as well as

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requested the administrative subpoena to alleviate her concerns about potentially violating grand jury secrecy. OSC instead chose to notify her of her right to file under 5 U.S.C. § 1221 at the MSPB. Administrative remedies having been exhausted at OSC, adjudication began.

[11] This Court set narrow standards for permissible disclosures in *U.S.* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) and *U.S.* v. *Baggott*, 463 U.S. 476 (1983), rejecting the Solicitor General's position for freer disclosure within DOJ.

procedural due process. This Court has explicitly recognized that an individual "certainly may not be punished for exercising a protected statutory or constitutional right." *U.S.* v. *Goodwin*, 457 U.S. 368, 372 (1982). Where the choice is between the rock and the whirlpool, duress is inherent in the decision to waive one or the other. *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967). The Fifth Amendment protects not only wrongdoers, but also those innocent of wrongdoing who have a reasonable fear of prosecution or may be ensnared by ambiguous circumstances. *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 557-58 (1956). Summary dismissal thereby violates due process of law. *Id.* at p. 559. Moreover, as elucidated in *Konigsburg* v. *State Bar of California*, 353 U.S. 252, 270 (1957), the government cannot draw unfavorable inferences as to a lawyer's truthfulness, candor or moral character based upon a refusal to answer asserting that the U.S. Constitution prohibited the tribunal from making that type of inquiry.

Administrative dismissal necessarily foreclosed the petitioner's property interest in employment. If a district judge abused discretion by using civil disentitlement (forfeiture) to penalize a fugitive in *Degan* v. *U.S.*, 517 U.S. 820 (1996), administrative decisionmakers definitely overreached here by imposing a constitutional dilemma and then penalizing the employee's lawful choice via "jurisdictional" dismissal. The equitable balance against a dismissal sanction should be even stronger where both the employee is exercising statutory and constitutional rights rather than flouting the law, and the decisionmaker can readily issue the requested subpoena or protective order. The potentially larger cash bonuses for speedy dismissals make the decisionmakers' abuse of discretion even more blatant.

Executive agencies cannot use the confidentiality employees protect as a sword against their right to petition the government for redress. To date, no federal court has apparently

denied a requested protective order in any attorney's retaliatory discharge lawsuit.[12] The Third Circuit discussed the attorney-client confidentiality context at length and permitted an attorney's lawsuit concerning her retaliatory discharge to continue with appropriate protective orders in *Kachmar* v. *Sungard Data Systems, Inc.*, 109 F.3d 173, 179-81 (3rd Cir. 1997). Earlier, in *Martin* v. *Lauer*, 686 F.2d 24, 33-34 (D.C. Cir. 1982), the D.C. Circuit had rebuffed DOJ's attempt to restrict two employee attorneys' confidential communications with counsel by citing the privilege. However, DOJ has continued to use confidentiality as a sword. In *Jacobs* v. *Schiffer*, 204 F.3d 259 (D.C. Cir. 2000), the D.C. Circuit awarded attorneys' fees after reaffirming that DOJ's preclearance requirement unjustifiably impeded an attorney's exercise of his First Amendment right to consult confidentially with counsel.

Neither the OSC nor the MSPB nor the Federal Circuit attempted any sort of balancing of the employee's interest in due process and access to the courts against the employer's confidentiality interest, despite the unwarranted dilemma that petitioner pointed out. This inaction in effect adopted the DOJ confidentiality sword position which the D.C. Circuit and Third Circuit rejected. Thus, even if all federal personnel cases must be appealed to the Federal Circuit, there is a conflict among the Circuits concerning confidentiality in attorney lawsuits against employers. The potential impact on the integrity of judicial proceedings from this circuit split warrants this Court's attention.

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[12] Most states allow attorneys to proceed with retaliatory discharge actions, despite their professional ethical duty of client confidentiality. Although all DOJ attorneys must maintain at least one active state bar membership as a condition of employment, neither of the exceptions (Illinois and Texas) is at issue here. *See* 16 A.L.R.5th 239 §§ 3, 4 (1993); 52 A.L.R.5th 405 § 3(b) (1997). Ethical rules generally allow attorneys to reveal client confidences (sometimes pursuant to court order) where necessary to get paid or to defend self against impropriety charges.

D. Improper Deference to OSC Termination

The Federal Circuit also rejected Weaver's appeal by claiming that she improperly set forth the OSC's termination letter as establishing jurisdiction. Weaver in fact requested (and did not receive) the *de novo*, trial type hearing which Congress contemplated in passing the WPA, and which the employee received in the sole WPA case cited, *Yunus v. Dept. of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001).

The MSPB's demands for OSC's closure letter and its own regulations demonstrate how the agency has converted the statutory Individual Right of Action (Title of 5 U.S.C. § 1221) into an "Individual Right of Action Appeal" (5 C.F.R. § 1209.1 *et seq.*), despite other MSPB regulations promising a hearing (5 C.F.R. § 1209.6 (b)) and a statutory addition in 1994 which explicitly allowed discovery (5 U.S.C. § 1221(d)). The MSPB has transformed legislatively expected *de novo* review into quicker appellate review of OSC's decision to terminate its investigation. This Court rejected a similar jurisdictional rationale in the parallel civil rights employment discrimination context in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). There, the absence of EEOC findings of reasonable cause did not bar suit under Title VII in district court. *Id.* at pp. 798-99. The Court refused to graft another requirement to the statute; the EEOC's notice of the right to sue sufficed.

Congress expressly adopted a similar right-to sue scenario in the WPA, and reiterated its intended liberal construction in 1994. In addition to the hortatory preamble (5 U.S.C. § 1201 nt.), the never-removed language from the original 1989 Act specifies that the MSPB should not consider OSC's termination decisions in adjudicating IRAs. 5 U.S.C. § 1221(f)(2). Nonetheless, during the MSPB's 1994 reauthorization, legislators heard that AJs were improperly demanding close-out letters and dismissing matters without

discovery, along with the MSPB's denials.[13] Congress then reinforced its preference for *de novo* review at the MSPB level by adding another subsection, this time to OSC's authorizing statute:

> (B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

5 U.S.C. § 1214(a)(2)(B). Dismissing a case because of a exercise of this statutory right makes consent a pretext, and eviscerates both subsections' language.

Due process also requires that a judge evaluating a dispositive motion construe all facts and inferences in the light most favorable to the non-moving party. Already, by definition, OSC has denied relief to all who receive IRA right-to-sue letters,[14] so the closure letters referenced therein can only become roadmaps for dismissals. A Westlaw search confirmed that the MSPB has never used in any IRA case this familiar formulation used by all federal courts when deciding dispositive motions.[15] Moreover, the MSPB's jurisdictional

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[13] H.R. Rep. No. 769, 103rd Cong., 1st Sess. 12-13, 22 (1994) H. Serial No. 103-19 at pp. 32, 43-44; *Reauthorization of the Office of Special Counsel: Hearing before the Subcomm. on Fed. Services of the Senate Comm. on Post Office and Civil Service* 36-37, 148-49 (1992); S.Rep. No. 416, 102d Cong., 2nd Sess. 6, 9 (1992).

[14] OSC only claimed to have achieved some favorable results in 7% of the whistleblower retaliation complaints closed in FY2000. GAO 01-715t at p. 6. The Federal Circuit brief lists lower historical rates.

[15] Former MSPB Chairman Erdreich, dissenting to a decision dismissing an IRA whistleblower's PFR, referred to construing all facts in the light most favorable to the agency. This tends to indicate other Board member thought agency-favorable formulations proper. *Moeller* v. *Dept. of Veterans Affairs*, 62 M.S.P.R. 361 (1994). MSPB does use the non-moving party formulation—to evaluate agency employer's objections to the OSC's relatively few stay requests.

dismissals mostly occur at the pleading stage, not the post-discovery summary judgment stage. Plus, MSPB almost never uses the judicial "genuine issue of material fact" terminology when determining whether factfinding via a hearing is necessary.[16]

Last term, this Court once again reaffirmed the notice pleading standard which has become a basic judicial due process element. In *Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 505 (2002), it unanimously held that notice pleading in civil matters only requires a plaintiff to submit a short and plain statement of the claim to the defendant before being allowed discovery, not the establishment of a *prima facie* case. *See also National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256 (1994); *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957).

The MSPB has never adopted notice pleading. Congress heard testimony that the MSPB used fact-pleading and non-documented procedures (presumably from the Civil Service Commission, since they predate the Federal Rules of Civil Procedure) to dismiss whistleblower cases.[17] The MSPB never confirmed this, but the scant empirical evidence indicates very few whistleblowers receive hearings. The opinion in petitioner's case included no factfinding. Indeed, that the MSPB often improperly shifted the burden of proof onto employees and away from the government was raised before this Court in *Lindahl* v. *O.P.M.*, 470 U.S. 768, 776 n.9 (1985), but not decided as necessary to the opinion. Finally, the MSPB and OSC normally fail to evaluate items in the record that detract from the weight of the chosen con-

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[16] Only once in a whistleblower IRA (and only in denying a later compliance request), and nine times in nonwhistleblower cases.

[17] H.Serial No. 103-19 at pp. 43-44.

clusion.[18] By refusing to adopt these judicial standards in its jurisdictional dismissals, the MSPB has sacrificed individuals' due process rights.

In *Sims* v. *Apfel*, 530 U.S. 103, 110-112 (2000), this Court refused to ratify an analogous jurisdictional dismissal rationale, namely an issue-exhaustion requirement at the Social Security Administration's nonadversarial administrative level. Like the Social Security process prior to the compensation-neutral ALJ level, the OSC was conceived as nonadversarial. Indeed, after hearing reports that OSC preferred to defend the "merit system" rather than employees claiming retaliation, Congress specifically directed OSC to protect individuals. 5 U.S.C. § 1201 nt. MSPB's issue exhaustion or evidence-preclusion practice—of evaluating, as here, only documents submitted to the OSC and refusing discovery—is thus unwarranted. Plus, OSC's complaints examiners do not act like judges–they hold no hearings and allow complainants no discovery from the agency. OSC's closure letters, like its right-to-sue letters, typically do not specify the evidence reviewed, although they are slightly longer. They deserve no deference because Congress never intended that they have the force of law.

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[18] In addition to not construing even the facts in the ten page retaliation timeline submitted to OSC in the light most favorable to petitioner, the Initial Decision included several factual errors or typos. The Background section referred to "poor performance evaluations" although Weaver's materials said she had received a rating of Excellent the previous year and that the performance rating both as issued and as revised after the additional whistleblowing included retaliatory elements. Also, although Weaver specifically stated that she "would not have signed the agreement if she had known that the agency intended to terminate her tenured employment," the Initial Decision incorrectly characterized her "argument" as that "she may have signed the agreement absent the alleged misrepresentation" followed by a wholly inapplicable "*Id.*" Finally, fn. 4 contained miscalculations, along with a typographical error which increased the purported period of delay by a year.

Thus, under the WPA statute and jurisprudential standards, the MSPB cannot circumvent due process by deferring to the OSC's administrative determinations rather than conduct *de novo*, trial type hearings. The Federal Circuit's silence concerning these bonus, confidentiality and review due process issues does not preclude review. The Court's attention is important because personnel issues throughout the government can only arise through the Federal Circuit.

II. PUBLIC POLICY AGAINST WAIVER ENFORCEMENT

Enforcing the contract of silence here, especially absent any hearing, has important policy implications for whistleblowers throughout the government, for it allows agencies (and by analogy, private employers) to retaliate until an employee capitulates. This disregards not only the WPA's employee-protective goal, but also fundamental public concerns in the First Amendment.

The *per curiam* opinion never mentioned Weaver's public policy arguments, only stated that she had not presented a *prima facie* case that her June 3, 1997 "settlement" and resignation were involuntary, while citing no legal precedent. Instead, the opinion added that Weaver was a licensed attorney and failed to submit evidence showing her inability to understand the nature of the agreement or an uninformed decision to enter into it, although an earlier sentence had noted her coercion and misrepresentation claims. The double negatives concealed the reversed burden of proof in enforcing this waiver of fundamental constitutional rights. In addition to passing over the circumstances of signature, the Federal Circuit, like the MSPB, failed to note: (1) the absence of any litigation to be settled or even notification of a non-agency forum at the time the agency presented the contract as a precondition to any transfer, (2) the only term the agency seeks enforced is the blanket waiver requiring Weaver to

withdraw all appeals or complaints and forbidding all future claims in any forum, and (3) the agency never claimed to fulfill all the contract's other terms.

A. Fundamental Constitutional Concerns

Enforcing the silence provisions and blanket waiver of government access without any hearing undercuts two different lines of First Amendment jurisprudence and ultimately raises separation of powers issues. The fundamental constitutional concerns involved warrant placing the burden of proving voluntariness on the agency seeking to enforce the waiver. Instead, the Federal Circuit opinion requires the employee to prove involuntariness and therefore jurisdiction before any hearing. It apparently condones both the discovery denial and construing facts and inferences to favor the agency as the party questioning jurisdiction, contrary to judicial due process discussed above.

Retaliation offends the Constitution by threatening to inhibit exercise of the protected First Amendment right. *Pickering* v. *Board of Education*, 391 U.S. 563, 574 (1968). As the unanimous Court recognized in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979), a public employee's private expression in a workplace is not beyond constitutional protection. Like Givhan, petitioner chose to express her views privately within the agency, all at a time when the GAO, DOD and DOJ were discussing this program. The speech link is clear because of the agency's contractual demand for petitioner's silence as a condition for any transfer out of the clearly hostile work environment. The agency specifically sought to eliminate all judicial remedy, thus all disclosure of its willful misbalancing of the scales.[19] DOJ therefore demanded an "unconstitutional

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[19] In *Connick* v. *Myers*, 461 U.S. 138, 148 n.8 (1983), the Court, analyzing *Givhan*, suggested that allegations of discrimination by a public employer are "inherently a matter of public concern."

condition" for the receipt of a government-provided benefit. *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972). *See also Lefkowitz* v. *Turley*, 414 U.S. 70, 82-83 (1973)("a waiver secured under the term of substantial economic sanction cannot be termed voluntary").

This past term, the Court analyzed the right to petition the government, which this contract of silence implicates, in two retrospective contexts. In *BE&K Construction Co.* v. *NLRB*, 122 S.Ct. 2390, 2399 (2002), it refused to condone an administrative sanction imposed upon a party losing a judicial case. The opinion analogized to free speech cases and the need for "breathing space protection," because even unsuccessful suits "allow the public airing of disputed facts,""raise matters of public concern" and "add[] legitimacy to the court system as a designated alternative to force." *Id.* at p. 2400. The Court also recognized the implications cover-ups have in impeding backward access to the courts in *Christopher* v. *Harbury*, 122 S.Ct. 2179, 2186 (2002). That opinion involved various non-cognizable and non-remedial claims, but concluded by noting that the plaintiff could still potentially get relief on pending tort claims before the district judge. *Id.* at p. 2190.

The "settlement agreement" here was aimed at speech and barring judicial access and thus relief. Because the agency never notified Weaver of a right to appeal outside DOJ and she had not then involved the court system, the claim cover-up aspect resembles that in *Harbury*. Moreover, unlike that district judge, the MSPB and Federal Circuit denied Weaver all access to necessary discovery from the agency, and all relief. The other retrospective aspect of the MSPB and Federal Circuit position, upholding the waiver without a hearing, is not as overt as the administrative sanctions at issue in *BE &K*. Yet the effect is the same, for both the contract and opinions concealed the disputed facts from the very judicial system whose integrity Weaver had tried to protect.

Furthermore, as fn.8 in the Initial Decision noted, Weaver then "withdrew" her oral complaint to DOJ-IG. This demonstrated only that retaliation worked after the last lockout, since DOJ-IG had already told Weaver it would not investigate. However, the ensuing silence necessarily diminished the protection that independent discussion and judicial access normally accords society.

Executive attempts to aggrandize power at the expense of individuals and of public discourse date to the founding fathers. Chief Justice Marshall twice rebuffed them in public employment cases. In the context of an executive who failed to forward the commission of a magistrate of the opposing political party, he held "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). At the end of his career, Marshall again reined in an executive, this time who tried to eliminate all judicial remedy for a former employee while garnishing private funds for missing public money. *U.S.* v. *Nourse*, 9 Pet. 8, 28-29 (1835).

The issue is whether the executive can be a law onto himself. The *per curiam* opinion's presumption of voluntariness and shifting the burden of proof allows executive agencies to circumvent judicial remedy simply by creating a hostile work environment to force retirements or other constructive discharges and then stonewalling. This contradicts the WPA and Congress' clearly expressed intent. Indeed, the opinion's *prima facie* case language, unaccompanied by citation, conceals both the many voluntariness hearings accorded non-whistleblowers making constructive discharge claims, as well as the lack of discovery and credibility determinations here.

The Court of Appeals' silence may indicate it imposes a heightened pleading requirement in whistleblower cases, despite this Court's teaching in *Crawford-El* v. *Britton*, 523

U.S. 574, 593 (1998). Moreover, in *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 682 (1999), the Court cited *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937), which stated, "courts indulge every reasonable presumption against waiver of fundamental rights." The Federal Circuit has cited that case in published decisions not arising from the MSPB, but chosen the opposite here.

Both the MSPB and Federal Circuit apparently indulged every presumption in favor of waiver (which they prefer to call settlement), despite its implications upon the fundamental constitutional rights of free speech and access to the courts. This case is important because it clearly sets forth the adjudicator's refusal to consider all contract terms and circumstances on the record, as well as because neither the MSPB nor Federal Circuit asked the state to prove it fulfilled its contract terms and had clean hands before approving the waiver. Despite only partial performance, the state wishes to enforce the contract term most against public policy: silence about government misconduct. Attention is warranted because this undercuts public employee speech nationwide.

B. Analogous Non-Waivable Statutes

The Federal Circuit's WPA non-analysis contrasts with the public policies against waiver that this Court has elucidated under analogous statutes, as have responsible regional courts of appeal and executive agencies. The key factor is the disparate bargaining power between an employer and individual employee, which otherwise can encourage disrespect for the policies these protective statutes embody.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 705-08 (1945), the Court refused to give effect to a waiver because such would nullify the purposes of the Fair Labor Standards Act. It noted that the Administrator's limited enforcement powers, and the difficult standard of proof in criminal

matters, otherwise could give employers an incentive to gamble and evade the act, thereby taking advantage of the employees' needs which were the public policy impetus for Congressional passage. *Id.* at pp. 709-10. *See also Hogue* v. *Southern Railway Co.*, 390 U.S. 516, 517 (1968)(Federal Employers' Liability Act); *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972)(National Labor Relations Act). Like those labor administrators, OSC has limited enforcement powers, and a difficult proof standard before the MSPB, which is why it engages in very few retaliation prosecutions. Enforcing waivers would encourage agency employers to flout the WPA's protections and thwart its goal of protecting employees revealing fraud, waste, abuse and gross mismanagement through lawful channels. Thus, the reasons for refusing to give effect to the WPA waiver here are at least as strong as in these labor contexts.

Civil rights statutes implement anti-discrimination policies analogous to the WPA's solicitude for lawful whistleblowers. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), this Court recognized that employees cannot prospectively waive rights under Title VII because such "would defeat the paramount congressional purpose behind Title VII."[20] Indeed, the Federal Circuit's and especially the AJ's opinion in petitioner's case resemble the trial court opinion overruled in *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986). In *Meritor*, this Court determined a hostile work environment claim sufficed to plead sex discrimination, and that the mere existence of an internal grievance procedure failed to insulate the employer from liability. *Id.* at pp. 65-67, 72-73. The Court found that fact that conduct was "voluntary" in the sense of the employee not being forced to participate, was not a defense, because the proper question was whether the

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[20] The Court most recently struck down a waiver in *Oubre* v. *Entergy Operations*, 522 U.S. 422 (1998). The Age Discrimination Employment Act (ADEA) expressly addresses waiver, unlike the WPA.

advances were unwelcome. *Id.* at pp. 68-69. Here, the changed work environment after the internal disclosures was unwelcome, yet adjudicators ignored this, as well as the minuscule power of the individual employee against layers of agency officials.[21]

Indeed, Courts of Appeals other than the Federal Circuit have recognized that employers use their workplace leverage to undercut legislative policies, and refused to enforce such waivers. The D.C. Circuit determined a reemployment offer conditioned upon acceptance of illegal and dangerous conditions "transgresse[d] the clear prohibition" and thus constituted a separate violation of the Mine Safety and Health Act in *Secretary of Labor (ex rel. Keene)* v. *Mullins*, 888 F.2d 1448, 1451-52 (D.C. Cir. 1989). *See also Doyle* v. *Hydro-Nuclear Services, Inc.*, 285 F.3d 243, 251-52 (3d Cir. 2002)(Energy Reorganization Act); [22] *Brooks* v. *Village of Ridgefield Park*, 185 F.3d 130, 136 (3d Cir. 1999)(FLSA); *Connecticut Power & Light* v. *Secr. of Labor*, 85 F.3d 89, 95 (2d Cir. 1996) (Energy Reoganization Act); *Macktal* v. *Secr. of Labor*, 923 F.2d 1150 (5th Cir. 1991)(same).

Enforcing waivers creates an incentive for the employer to choose to ignore the public policy the statute embodies, but instead use bargaining strength (or misrepresentations or additional statutory violations) to secure the waiver. The

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[21] This Court most recently recognized the coercive effects of a hostile work environment in civil rights cases. *National Railroad Passenger Corporation* v. *Morgan*, 122 S.Ct. 2061 (2001); *Haddle* v. *Garrison*, 525 U.S. 121 (1998); *Farragher* v. *City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). Jurisdiction over civil rights cases rests in district courts and regional courts of appeal, after consideration at the agency level by EEOC or OSC pursuant to their letter of understanding.

[22] Noting the Secretary of Labor had deemed the prospective waiver unenforceable, Doyle has filed a petition for certiorari, No. 02-297, which the Solicitor General opposes.

potential for abuse is greatest where the waiver is secured without involving any judge to ensure against overreaching. Thus, MSPB's and Federal Circuit's waiver enforcement in the whistleblower context condones a code of silence that undercuts public policy.

C. Waiver Demand as Violation

Because the Federal Circuit ignored the public policy issues, it never addressed whether DOJ's presentation of the contract of silence constituted a separate statutory violation, as under the labor and environmental statutes above. Because separate violation analysis fulfills the public policy, decision on constitutional grounds may not be necessary.

The WPA's legislative history emphasized the public interest in good government and having civil servants report misconduct. Ample language urges expansive construction. Indeed, the statutory preamble even states its goal as "to prevent reprisals, and to help eliminate wrongdoing within the Government." 5 U.S.C. § 1201 nt. One report expressed dissatisfaction with limited protections under the First Amendment after *Mt. Healthy City Board of Educ.* v. *Doyle*, 429 U.S. 274 (1977).[23] By 1994, Congress realized how creative and pervasive reprisals could be, and how narrow-minded were the MSPB's and Federal Circuit's interpretations.[24] In broadening the WPA, it added a catchall prohibited personnel action, "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2308(a)(2)(ix). This resembles Title VII's language ("terms, conditions, or privileges of employment") which the Court found enabled hostile work environment claims in *Meritor*, 477 U.S. at p. 64. Clearly, the resignation demanded and temporary appointment also significantly changed petitioner's

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[23] H.R. Rep. No. 274, 100th Cong. 1st Sess. 26-27 (1987).

[24] H.R. Rep. No. 769 at pp. 17-18.

duties and responsibilities, and the agency made clear that it would not transfer her out of the hostile work environment absent such.

Furthermore, weeks before DOJ presented this contract to petitioner, unknown to her, the EEOC issued Policy Statement 915.002, which declared that agreements containing waivers of future claims would be investigated as additional violations of the antidiscrimination laws. Under this rationale, presenting this agreement with both prospective and retrospective waivers was a separate WPA violation.

Enforcing whistleblower waivers against government attorney employees in summary administrative proceedings also raises serious separation of powers issues, for such attorneys are officers of the court as well as executive branch employees. Thus, the Executive would not only be usurping a judicial function administratively, but also potentially undercutting the integrity of judicial proceedings. Indeed, the D.C. Circuit put even civil attorneys employed by the government on notice that they should abide by this Court's command to prosecutors that they "do justice, rather than win cases." *Freeport-McMoran Oil & Gas Company, Inc.* v. *F.E.R.C.*, 962 F.2d 45, 46 (D.C. Cir. 1992), *citing Berger* v. *United States*, 295 U.S. 78, 88 (1935). Plus, where courts do not hear about protective order violations or disregarded case law (such as *Martin* v. *Lauer*, *supra*), they are deprived of their ability to exercise supervisory power over their own proceedings. The Fourth Circuit amply documented that power in *U.S.* v. *Shaffer Equipment*, 11 F.3d 450, 457-58 (4th Cir. 1993). The Federal Circuit has issued no comparable reaffirmation of government employee ethics.

The public interest in the integrity of DOJ attorneys warrants this Court's attention. By not publishing their decisions in this case, the Federal Circuit and MSPB have condoned these contracts and thus retaliation in the whistleblower context. Many DOJ attorney employees have

anonymously joined the Court of Claims overtime class action lawsuit and cited retaliatory fears even without whistleblowing. The administrative agencies below ignored those retaliation allegations. Petitioner's circumstances provide an important vehicle not only for the vindication of her individual rights, but also of judicial processes in the separation of powers context.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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